Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
SOUTHWESTERN BELL MOBILE SYSTEMS, INC.	
Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Law Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments	____ Docket No. ____

TO: The Commission

PETITION FOR DECLARATORY RULING

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SUMMARY

Various class action lawsuits throughout the country are challenging the decisions of commercial mobile radio service ("CMRS") providers to charge customers for calls in whole-minute increments (rather than, for example, in per-second increments or on a modified flat-fee basis). In one such action in federal court in Massachusetts, a putative plaintiff class (led by a single class representative) brought such a "rounding up" challenge against Southwestern Bell Mobile Systems, Inc. ("SBMS") and also challenged SBMS's charges for incoming calls. The plaintiff brought her claims both under Section 201(b) of the Communications Act and under state law. The court concluded that the FCC might be the more appropriate body to make at least an initial determination with respect to various issues in that case, and SBMS has filed this Petition to provide the Commission with the opportunity to consider those issues. In particular, for the reasons set forth in this Petition, SBMS requests the Commission to declare that:

> (a) Congress and the Commission have established a general preference that the CMRS industry be governed by the competitive forces of the marketplace, rather than by government regulation;
>
> (b) charging for CMRS calls in whole-minute increments (sometimes referred to as "rounding up") and charging for incoming calls are common CMRS industry practices which are not unjust or unreasonable charges or practices under Section 201(b) of the Communications Act, 47 U.S.C. § 201(b);

(c) the term "call initiation" in the CMRS industry refers to a cellular customer activating his or her phone both to place an outgoing call and to accept an incoming call;

(d) the definition of the term "rates charged" in Section 332(c)(3) of the Communications Act, 47 U.S.C. § 332(c)(3), includes at least the elements of a CMRS provider's choice of which services to charge for and how much to charge for those services;

(e) challenges to the "rates charged" to end users by a CMRS provider, including charges for incoming calls and charges in whole-minute increments, are exclusively governed by federal law under Section 332(c)(3) of the Communications Act, 47 U.S.C. § 332(c)(3); and

(f) state-law claims directly or indirectly challenging the "rates charged" by CMRS providers are barred by Section 332(c)(3).

These are extremely important issues with national implications for the CMRS industry which directly implicate the Commission's expertise and should be decided by the Commission, rather than on a piecemeal, and perhaps inconsistent, basis by individual courts.

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TO: The Commission

PETITION FOR DECLARATORY RULING

Southwestern Bell Mobile Systems, Inc. ("SBMS" or "Petitioner") hereby requests, pursuant to Section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 554(e), and Section 1.2 of the Commission's Rules, the Commission to issue a declaratory ruling as set forth below.

INTRODUCTION

Various class action lawsuits throughout the country are challenging the decisions of CMRS providers to charge customers for calls in whole-minute increments (rather than, for example, in per-second increments or on a modified flat-fee basis).[1] In one such action in federal court in Massachusetts,[2] a putative plaintiff class (led by a single class representative) brought such a "rounding up" challenge against SBMS and also challenged SBMS's charges for incoming calls. The plaintiff brought her claims both under Section 201(b) of the Communications Act and under state law. The court concluded that the FCC might be the more appropriate body to make at least an initial determination with respect to various issues in that

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[1] See, e.g., Sanderson v. AWACS, Inc., 958 F. Supp. 947 (D. Del. 1997) (Delaware class action challenging, inter alia, rounding up practice of cellular provider); DeCastro v. AWACS, Inc., 935 F. Supp. 541 (D.N.J. 1996) (New Jersey class action against CMRS provider challenging, inter alia, practice of rounding up), notice of appeal dismissed, 940 F. Supp. 692 (D.N.J. 1996); In re Comcast Cellular Telecomm. Litig., 949 F. Supp. 1193 (E.D. Pa. 1996) (Pennsylvania class action challenging, inter alia, cellular provider's practice of rounding up); Hardy v. Claircom Communications Group, Inc., 937 P.2d 1128 (Wash. Ct. App. 1997) (Washington State class action against air-to-ground radiotelephone services providers).

[2] Smilow v. Southwestern Bell Mobile Systems, Inc., Civ. A. No. 97-10307-REK (D. Mass.) ("Smilow").

case,[3] and SBMS has filed this petition to provide the Commission with the opportunity to consider those issues.[4] In particular, SBMS requests the Commission to declare that:

> (a) Congress and the Commission have established a general preference that the CMRS industry be governed by the competitive forces of the marketplace, rather than by government regulation;
>
> (b) charging for CMRS calls in whole-minute increments (sometimes referred to as "rounding up") and charging for incoming calls are common CMRS industry practices which are not unjust or unreasonable charges or practices under Section 201(b) of the Communications Act, 47 U.S.C. § 201(b);
>
> (c) the term "call initiation" in the CMRS industry refers to a cellular customer activating his or her phone both to place an outgoing call and to accept an incoming call;
>
> (d) the definition of the term "rates charged" in Section 332(c)(3) of the Communications Act, 47 U.S.C. § 332(c)(3), includes at least the elements of a CMRS provider's choice of which services to charge for and how much to charge for those services;
>
> (e) challenges to the "rates charged" to end users by a CMRS provider, including charges for incoming calls and charges in whole-minute increments, are exclusively governed by federal law under Section 332(c)(3) of the Communications Act, 47 U.S.C. § 332(c)(3); and

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[3] See Memorandum and Order at 8-9 (July 11, 1997).

[4] The Smilow court ordered its clerk to submit the Memorandum and Order to the FCC as notice of the court's proceedings, and said that after the Commission "has had a reasonable opportunity to rule, [the] court will revisit the matter." Id. at 9.

(f) state-law claims directly or indirectly challenging the "rates charged" by CMRS providers are barred by Section 332(c)(3).

ARGUMENT

I. BOTH CONGRESS AND THE COMMISSION HAVE TAKEN THE POSITION THAT MARKET FORCES, RATHER THAN GOVERNMENT REGULATION, SHOULD DETERMINE CMRS INDUSTRY PRACTICES

Guidance clearly setting forth that both Congress and the Commission prefer to allow market forces, rather than government regulation, to shape the CMRS industry may be helpful to the Smilow court. This preference has been manifested in several ways. First, in revising Section 332(c)(3) of the Communications Act in 1993[5] Congress generally precluded the states from regulating any aspect of the rates charged by CMRS providers.[6] Moreover, the legislation enacting Section 332(c)(3) "reflect[ed] a general preference in favor of reliance on market forces rather than regulation . . . ."[7]

The Commission has also made this evaluative choice and expressed a strong interest in having

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[5] See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312 (1993).

[6] 47 U.S.C. § 332(c)(3). States may only regulate these areas with Commission approval and in particular circumstances. See 47 U.S.C. § 332(c)(3).

[7] Report and Order, In re Petition of New York State Public Service Commission to Extend Rate Regulation, 10 FCC Rcd. 8187, ¶ 18 (1995).

competition, rather than regulation, shape CMRS industry practices. The Commission has said that, "in striving to adopt an appropriate level of regulation for CMRS providers," it was establishing "as a principal objective, the goal of ensuring that unwarranted regulatory burdens are not imposed upon . . . CMRS providers,"[8] and has said that "[m]arket forces -- not regulation -- should shape the developing CMRS marketplace."[9]

Moreover, market forces seem to be working well. Indeed, the very practices challenged by the Smilow plaintiff are competitive tools and ways in which CMRS carriers are now differentiating themselves in the marketplace. For example, while many CMRS providers bill on a per-minute basis, others offer per-second billing, or flat-fee billing with various quantities of minutes free depending on the monthly fee chosen. Further, while many CMRS providers bill customers for outgoing and incoming calls, others offer the first

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[8] Second Report and Order, In re Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, 9 FCC Rcd. 1411, ¶ 15 (1994), reconsideration granted in part, 10 FCC Rcd. 7824 (1995), reconsideration denied, 11 FCC Rcd. 19729 (1996).

[9] See Memorandum Opinion and Order on Reconsideration, In re Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, 12 FCC Rcd. 9972, ¶ 22 (1997).

minute of incoming calls free, and still others are experimenting with billing CMRS charges to the individual, who may be at a landline phone, who places the call. The presence of so many rate options not only shows that the marketplace is working well, but also allows consumers to choose the rate plan they find most desirable and so best serves the public interest.[10] Thus, the Commission should declare that a CMRS provider's choices of rate plans are competitive rate-setting decisions which are best left to the increasingly competitive marketplace.

II. ROUNDING UP AND BILLING FOR INCOMING CALLS ARE COMMON INDUSTRY PRACTICES WHICH ARE NOT UNJUST OR UNREASONABLE UNDER SECTION 201

SBMS also requests the Commission to declare that charging in whole-minute increments and charging for incoming calls do not violate Section 201(b). First, as discussed above, market forces, rather than regulation, best serve the public interest. In any event, as shown below, the practices challenged in the Massachusetts case and elsewhere meet the Commission's standards for justness and reasonableness under Section 201(b). Moreover, these practices, common throughout the CMRS

[10] For example, the Smilow plaintiff herself had the option of choosing from numerous rate plans which included various options regarding monthly fees and free minutes.

industry, have long been accepted by both the Commission and the states, strongly indicating that they are just and reasonable.

A. General Section 201(b) Standards Have Been Met

In assessing claims under Section 201(b), the Commission has said that the "traditional test of reasonableness of a rate structure is that it is reasonably related to the cost of providing service."[11] Further, it has "generally described the measure of reasonableness under [Section 201] in terms of rates that reflect or emulate competitive market operations."[12]

Charging for incoming calls and in whole-minute increments are well within these bounds. For example, both reflect the costs of the CMRS provider. Charging for calls on a per-minute basis is a simplified method on which to base charges which still reflects general costs. As the Commission itself has indicated, charging on a per-second basis would likely lead CMRS carriers

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[11] Memorandum Opinion and Order, In re United States Transmission Systems, Inc. (Revisions to Tariff F.C.C. No. 1), 66 F.C.C.2d 1091, ¶ 5 (1977).

[12] Report and Order, In re Petition of New York State Public Service Commission to Extend Rate Regulation, 10 FCC Rcd. 8187, ¶ 17 (1995).

merely to reformulate their per-unit charges, with the ultimate costs to customers unchanged.[13]

Similarly, charging for incoming calls is reasonable because the carrier incurs costs to switch and transport incoming calls, just as it does for outgoing calls, and the limited channel capacity of a CMRS system is occupied by incoming as well as outgoing calls. Thus, if a CMRS provider could not charge for incoming calls, it might not recover a significant component of its costs.[14] Finally, the competitive nature of this marketplace forces CMRS rates to meet the Commission's standard above of "reflect[ing] or emulat[ing] competitive market operations."

B. These Practices Have Been Accepted By the Commission and the States and Are Common Industry Practices

The Commission should also make clear that there is a long history of Commission and state acceptance of the challenged practices. For example, the Commission explicitly addressed the practice of rounding up in a 1993 letter from the Acting Chief of the Common Carrier Bureau. The Bureau rejected a rulemaking petition

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[13] See note 16, infra.

[14] Alternatively, the CMRS provider could presumably increase its rates for outgoing calls or its monthly fees. Such rate setting methods, however, would not be economically efficient because the costs of incoming calls would not be recovered from the customers who obtain the benefits of those calls.

asking that it require long-distance carriers to bill on a per-second basis, rather than on a per-minute or per-six second basis.[15] It reasoned that "the rule changes . . . request[ed] appear unlikely to benefit consumers,"[16] and in fact stated that avoiding regulation should increase competitive options:[17]

> [T]he Commission has not generally undertaken the prescription of telephone industry billing procedures. Numerous providers compete for the long-distance business of both residential and business customers. The billing practices of carriers vary -- some already offer sub-minute or per-second billing options, while others offer bulk rate options under which call length is irrelevant. Thus, carriers compete in terms of their practices, and customers are free to select a carrier that offers the most desirable billing options. If the Commission were to mandate a particular billing procedure, it would eliminate this form of service competition.[18]

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[15] See Letter from Kathleen B. Levitz, Acting Chief, Common Carrier Bureau, to Donald L. Pevsner, Esq. (dated Dec. 2, 1993) (stamped "Received" Dec. 23, 1993) ("Levitz Letter") (attached hereto as Appendix A).

[16] Levitz Letter at 1. The Bureau reasoned in part: "We believe it is unlikely that the rule changes you seek will reduce consumer phone bills. If per-second billing were required, interstate long-distance carriers would almost certainly react by setting their per-second rates at a level designed to recover the revenues that were generated by the previous rates." Id.

[17] Levitz Letter at 1.

[18] Levitz Letter at 2. Further, in another order the Commission found that Connecticut did not show that "'market conditions with respect to [commercial mobile

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Furthermore, both the Commission and various state regulatory commissions (during those years in which the states had some authority with respect to CMRS rates) have also long accepted rounding up and billing for incoming calls through their approval and allowance of tariffs outlining these CMRS practices.[19] These actions by the states and the FCC indicate that these billing practices are not unjust or unreasonable.

Finally, the Commission should advise the Smilow court that charging for incoming calls and charging in whole-minute increments are common throughout the CMRS

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radio] services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory,'" even though the state presented, as purported evidence of this, that a carrier billed in whole-minute increments. The Commission also noted that such charges did not violate any federal regulation. Report and Order, In re Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, 10 FCC Rcd. 7025, ¶¶ 6, 60, 74 (1995), aff'd, Connecticut Department of Public Utility Control v. FCC, 78 F.3d 842 (2d Cir. 1996).

[19] See, e.g., Porr v. Nynex, 660 N.Y.S.2d 440, 447 (App. Div. 1997) (stating that "the [New York State] PSC [Public Service Commission] authorized the defendants' 'rounding up' practice"); AWACS, Inc. Tariff F.C.C. No. 1, at 16-17 (issued March 2, 1993) (stating that there would be charging for incoming calls and charging in whole-minute increments) (attached hereto as Appendix B); Rogers Radiocall, Inc. (dba Cellular One) Ill. C.C. No. 1, at 18 (issued Jan. 3, 1985) (stating that there would be charging for incoming calls and charging in whole-minute increments) (attached hereto as Appendix C).

industry and are generally accepted practices which are well known to consumers. As the Commission itself has noted, "cellular customers are usually billed for airtime charges on incoming calls,"[20] and it is widely recognized that rounding up is common throughout the CMRS industry.[21] Given this past and present acceptance and prevalence, the FCC should advise the court that these practices match the expectations of the average customer and are just and reasonable.

C. Definition of Call Initiation; Just and Reasonable Practices

Given the nature of the Smilow plaintiff's claims, it would also be beneficial for the FCC to advise the court on the meaning of the term "call initiation" in the CMRS industry.[22]

The FCC, with the benefit of its technical and policy expertise, should advise the court that the term "call initiation" as used in the CMRS industry refers to the CMRS customer activating his or her phone, e.g., by

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[20] Memorandum Opinion and Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, In re Rules and Policies Regarding Calling Identification Service, 10 FCC Rcd. 11700, ¶ 101 n.146 (1995), stayed in part, 10 FCC Rcd. 13819, 11 FCC Rcd. 1743, affirmed sub nom. California v. FCC, 75 F.3d 1350 (9th Cir. 1995), cert. denied, 116 S. Ct. 1841 (1996).

[21] See note 23, infra.

[22] This term appears in the Smilow court Memorandum and Order noted above.

pressing the "SEND" button, to either place an outgoing call or accept an incoming call, and that the initiation and termination of a call (by pressing the "END" button) is the same no matter whether the call is an incoming one or an outgoing one.

The FCC should advise the court that the long-standing and widespread practices of charging for incoming calls and charging in whole-minute increments are just and reasonable. Customers typically receive a variety of information advising them that their calls are billed in these ways. For example, charges on customers' bills are listed call-by-call and are clearly marked *INCOMING* when appropriate. Further, the "Welcome Kit" which is provided to each new customer also clearly indicates that charges will be incurred for incoming calls. Thus, it is apparent to any customer that SBMS and other carriers charge customers for incoming calls.

With respect to rounding up, the provider must bill in some unit of time, and the minute is the traditional and long-standing unit.[23] Moreover, the

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[23] See, e.g., David Wichner, "Cell-phone users may get a break on billing," Arizona Daily Star, July 21, 1997, 3D (noting "practice by most cellular carriers of 'rounding up' to the next minute when billing for each call"); Jeannine Aversa, "Court Backs MCI on Rounding Disclosure," RCR Radio Communications Report, May 5, 1997, at 18 ("MCI, like most other long-distance and

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billing unit is clear from the customer bills, where all calls are listed in whole-minute increments, and the "Welcome Kit", which clearly indicates that charges are based on whole-minute increments. As several courts have recognized, any reasonable customer would recognize through such bills that their calls were being rounded.[24] Accordingly, the FCC should declare that SBMS's practice of billing in whole-minute increments is just and reasonable and conforms with the customary and expected practice.

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wireless companies, rounds up the length of each long-distance call to the next full minute for the purpose of billing."); "Plugged in News Bytes," Los Angeles Daily News, July 7, 1997, at B1 ("Most cellular companies round up charges to the next minute."); Bloomberg News, "Nextel to bill cell calls by second, not minute," Patriot Ledger, March 3, 1997, at 16 ("Traditionally, cellular and long-distance phone companies have charged customers by rounding up to the nearest minute.").

[24] It has been widely recognized by the courts that customers are not deceived or misled when charges are made in whole-minute increments, another factor indicating that this practice is just and reasonable. See, e.g., Marcus v. AT&T Corp., 938 F. Supp. 1158, 1174 (S.D.N.Y. 1996) (IXC's "failure to disclose the exact duration of the calls on its bills also is not materially misleading because no consumer reasonably could believe that a designation of a call in whole minutes accurately reflects the length of that call"). See also Alicke v. MCI Communications Corp., 111 F.3d 909, 912 (D.C. Cir. 1997); Porr v. Nynex, 660 N.Y.S.2d 440, 447 (App. Div. 1997).

III. STATE LAW CHALLENGES TO ROUNDING UP OR CHARGES FOR INCOMING CALLS ARE PREEMPTED BY SECTION 332(C)(3) OF THE COMMUNICATIONS ACT

A. "Rates Charged" Means at Least the Choice of Which Services the Provider Charges For and How Much To Charge For Those Services

Section 332(c)(3) of the Communications Act, 47 U.S.C. § 332(c)(3), sets a clear limit on state authority over CMRS services; it says that "no State . . . shall have any authority to regulate the . . . rates charged by any [CMR] service."[25] SBMS requests that the Commission provide guidance to the court on the definition of the term "rates charged" in Section 332(c)(3) and thus on the area into which state regulatory authority may not reach. Specifically, the Commission should declare that the term "rates charged" includes: (a) which services the CMRS provider chooses to charge for; and (b) how much it decides to charge for those services.[26] If a state were allowed to regulate either which services a CMRS provider could charge for

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[25] 47 U.S.C. § 332(c)(3)(A). States, however, are not precluded from regulating the "other terms and conditions" of CMR service. Id.

[26] Such a definition of the term "rates charged" leaves ample room for the states' authority under the "other terms and conditions" language of Section 332(c)(3). For example, the state may regulate how often a bill is sent, when a bill is due, or whether the correct CMRS rate was applied. To reach the conclusions at issue here, the Commission need not define the full reach of either the phrase "rates charged" or "other terms and conditions."

or how much it could charge, Congress' intent in Section 332(c)(3) would be thwarted.

B. State-Law Claims Challenging the Rates Charged by CMRS Providers Violate Section 332(c)(3)

Under the appropriate definition of "rates charged," it is clear that state law claims such as those asserted in Smilow are prohibited by Section 332(c)(3). As noted above, Section 332(c)(3) bars state regulation of CMRS rates. This restriction has been well-recognized by both the Commission and the courts.[27] Suits challenging CMRS pricing decisions and

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[27] For Commission statements, see, e.g., Second Report and Order, In re Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, 9 FCC Rcd. 1411, ¶ 12 (1994) (OBRA, enacting Section 332, "preempt[s] state regulation of entry and rates for both CMRS and PMRS providers"), reconsideration granted in part, 10 FCC Rcd. 7824 (1995), reconsideration denied, 11 FCC Rcd. 19729 (1996); Report and Order, In re Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services, 10 FCC Rcd. 7842, ¶ 8 (1995) (Section 332(c)(3) "express[es] an unambiguous congressional intent to foreclose state regulation in the first instance"), recon. denied, 10 FCC Rcd. 12427 (1995); Notice of Proposed Rulemaking, In re Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, 8 FCC Rcd. 7988, ¶ 79 (rel. Oct. 8, 1993) ("Section 332(c)(3)(A) preempts state and local rate and entry regulation of all commercial mobile services").

For court statements, see, e.g., Connecticut Dep't of Pub. Util. Control v. FCC, 78 F.3d 842, 846 (2d Cir. 1996) (in Section 332(c)(3), "Congress provided a general preemption of state [CMRS] regulation"); In re Topeka SMSA Ltd. Partnership, 917 P.2d 827, 832 (Kan. 1996) (Section 332(c)(3) "preempts state or local

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seeking either damages or an injunction violate this restriction by involving state law in either or both of the two central elements of "rates charged" -- i.e., what services are charged for or how much is charged for those services.

Further, an award of damages for state-law claims -- especially in a class action -- challenging charges for incoming calls or rounding up would constitute state rate regulation prohibited by Section 332(c)(3) because such an award would effectively set rates (retroactively) for CMRS services.[28] Injunctions restricting the pricing practices of CMRS providers also necessarily involve state law in the determination of whether the carrier may charge for a service and how

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regulation of the rates charged by any provider of CMRS"); Metro Mobile CTS of Fairfield County, Inc. v. Department of Pub. Util. Control, Nos. CV950051275S, CV950550096S, 1996 WL 737480, at *1 (Conn. Super. Ct. Dec. 11, 1996) (through Section 332 "Congress has preempted the [Connecticut State Department of Public Utility Control] from exercising licensing or rate-making authority relative to the provision of cellular telephone services by cellular providers").

[28] It is clear that when a court adjudicates state law claims that action constitutes the type of state action prohibited by Section 332. As one federal district court has stated, "It is undisputed that like legislative or administrative action, judicial action constitutes a form of state regulation. Thus, like state legislative action, state court adjudications threaten the uniformity of regulation envisioned by a congressional scheme." In re Comcast Cellular Telecomm. Litig., 949 F. Supp. 1193, 1201 n.2 (E.D. Pa. 1996).

much it may charge. These claims -- no matter if they are framed as breach of contract, fraud, or otherwise[29] -- are state intrusions on the exclusive authority of the Commission to regulate the rates charged to customers by CMRS providers. Moreover, they run a high risk of creating inconsistent and competition-limiting CMRS regulation, a possibility Congress sought to avoid in enacting Section 332(c)(3).[30] Thus, such claims should be prohibited.

1. An Award of Damages Would Constitute Rate Regulation

A CMRS provider can choose from a number of different options in deciding whether and how to charge for incoming calls and how to measure the length of calls. For example, it might charge for both incoming and outgoing calls, charge for outgoing calls only, charge a monthly fee that includes a quantity of outgoing and/or incoming calls, or offer the first minute free for incoming calls. Similarly, it could charge a customer in whole-minute increments, charge on a per-second basis, or charge a customer a flat fee for a certain amount of call-time during certain parts of the day or week. All of these potential decisions are

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[29] Instead of what they actually are: direct attacks on the rates charged by a CMRS provider.

[30] See text accompanying notes 53-55, infra.

part and parcel of the rates charged by that provider.[31] The ultimate goal and effect of the state-law class action claims described above, however, is to alter and constrain the various rate plans and pricing options available in the marketplace.

Class action cases affect not just a single customer; they affect the rates of the entire customer base by seeking across-the-board relief, resetting retroactively the carrier's general prices, and altering its choices on what services to charge for and how much to charge for those services.[32] Such relief would amount to regulation of the "rates charged."[33]

Court precedent makes clear that damage awards (even in individual cases) constitute rate regulation. As one court noted in a rounding up case, "any court-imposed award of damages [as a result of rounding up]

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[31] Moreover, each such decision the provider makes on these issues not only constitutes a rate in itself, but also affects the provider's decisions on what other services the customer will be charged for and how much he or she will be charged for that service.

[32] This is true whether the relief granted is injunctive or monetary. These areas are described in more detail in the following sections.

[33] Individual actions which would have the effect of setting a precedent on rates for all customers (e.g., because of stare decisis or collateral estoppel) are similarly problematic.

would by definition result in [plaintiffs] paying something other than the filed rate."[34]

In similar circumstances, the Supreme Court has also indicated that the award of such damages would amount to state regulation of rates. In Arkansas Louisiana Gas Co. v. Hall ("Arkla"),[35] which involved a breach of contract claim regarding the purchase of federally rate-regulated natural gas, the Supreme Court agreed that "[n]o matter how the ruling of the Louisiana Supreme Court [granting damages] may be characterized, . . . it amounts to nothing less than the award of a retroactive rate increase."[36]

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[34] Hardy v. Claircom Communications Group, 937 P.2d 1128, 1132 (Wash. Ct. App. 1997). Other courts have reached the same or similar results. See, e.g., In re Comcast Cellular Telecomm. Litig., 949 F. Supp. 1193, 1204 (E.D. Pa. 1996) ("a state court would be prevented from giving Plaintiffs the remedies they seek [including compensatory damages and an injunction against billing for non-communication time] without engaging in regulation of the rates of a CMRS provider"); Marcus v. AT&T Corp., 938 F. Supp. 1158, 1171 (S.D.N.Y. 1996) (in invoking filed rate doctrine, stating that "to require [defendant IXC] to pay damages here would mean that these plaintiffs . . . are entitled to a reduced rate . . .").

[35] 453 U.S. 571 (1981).

[36] Id. at 578. See also id. at 584. The Court added that "the mere fact that respondents brought this suit under state law would not rescue it, for when [C]ongress has established an exclusive form of regulation, 'there can be no divided authority over interstate commerce.'" Id. at 580.

Arkla has been invoked to reject a wide variety
[Footnote continued on next page]

The prohibited ratemaking effects of such damage awards are exacerbated in class actions which may result in both a retroactive rate decrease for all of the provider's customers and a lasting change in the provider's rate structure. Section 332(c)(3) intends that any such broad-ranging impacts on rates can be achieved solely, if at all, by Commission action.[37]

Another reason a court would be engaged in prohibited rate regulation by awarding damages based on a state-law claim is that the court would have to determine what a reasonable rate would have been in

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of state law claims. For example, in Southern Union Co. v. FERC, 857 F.2d 812 (D.C. Cir. 1988), the D.C. Circuit invoked Arkla to reject FERC's decision that damages could be awarded for fraud and negligent misrepresentation claims related to prices for federally regulated gas. The court said that "the state measure of damages is based upon, and has the effect of awarding, a price for interstate gas that, to the extent that price exceeds federal guidelines, the state court has no power to award," id. at 818, because it had no power to award a retroactive rate increase.

[37] The Common Carrier Bureau has recognized that the award of damages under a section 201(b) claim violates the prohibition against retroactive ratemaking, even where the rates at issue were not tariffed (i.e. were set by contract). As the Bureau said, "Even if the Commission were to determine that rates in the [disputed] contract had contravened Sections 201 and 202 of the Act, it could not lawfully prescribe rates having a retroactive effect. The Commission's authority to determine and prescribe just and reasonable rates derives from Section 205 of the Act which authorizes rates to be prescribed only on a prospective basis." In re Long Distance Corp., Complainant v. Yankee Microwave, Inc., Defendant, 8 FCC Rcd. 85 (1993), aff'd on other grounds, 10 FCC Rcd. 654 (1995).

order to calculate damages -- a determination involving the court in ratemaking. The court in Wegoland Ltd. v. NYNEX Corp., a fraud-related claim challenging the rates of several telephone companies, for example, held that a determination of damages would entwine the court in a calculation of the reasonableness of those rates. The court "recognize[d] that plaintiffs are seeking an award of damages that does not explicitly ask the court to determine reasonable rates. However, like the Eighth Circuit, I believe that such an award would effectively require determining what a reasonable rate would have been."[38] Several other courts have come to similar

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[38] 806 F. Supp. 1112, 1121-22 (S.D.N.Y. 1992).

In affirming the lower court's decision, the Second Circuit agreed with this analysis. It said:

> The plaintiffs respond that courts would not be required to determine a "reasonable" rate, but rather would only have to decide what damages arose from the fraud, a task courts routinely undertake. However, the two are hopelessly intertwined: "The fact that the remedy sought can be characterized as damages for fraud does not negate the fact that the court would be determining the reasonableness of rates" and that "any attempt to determine what part of the rate previously deemed reasonable was a result of the fraudulent acts would require determining what rate would have been deemed reasonable absent the fraudulent acts, and then finding the difference between the two."

[Footnote continued on next page]

conclusions.[39] The determination (and retroactive setting) of a reasonable rate, however, would engage state law in exactly the type of CMRS rate regulation prohibited by Section 332(c)(3).

Moreover, the determination of a new "reasonable" rate would likely be a very involved and intrusive process. Calculating the "reasonable" rate absent rounding up is not merely a matter of dividing the per-minute charge by sixty. For example, if a carrier were forced to bill in per-second increments, the per-second rate, as the Commission seems itself to have acknowledged,[40] would rise to recover the lost revenue needed to cover the carrier's costs. Furthermore, each second would probably not be charged at the same rate. Rather, if forced to charge on a per-second basis, CMRS providers would likely charge a higher rate for the

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Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 21 (2d Cir. 1994) (citations omitted).

[39] See, e.g., H.J., Inc. v. Northwestern Bell Tel. Co., 954 F.2d 485, 493-94 (8th Cir. 1992), cert. denied, 504 U.S. 957; Birnbaum v. Sprint Communications Corp., No. 96-CV-2514(ARR)(CLP), 1996 WL 897326, *5 (E.D.N.Y. Nov. 19, 1996) (attempt to enforce superseded tariff would require court "to make a determination that the Original Tariff constitutes a reasonable rate"); Hardy v. Claircom Communications Group, 937 P.2d 1128, 1132 (Wash. Ct. App. 1997) (plaintiffs' rounding up "allegations are such that a court would necessarily have to consider the reasonableness of the rates charged in order to resolve them on the merits").

[40] See note 16, infra.

initial seconds, when a variety of initial, non-recurring costs are incurred, than for later seconds. This type of calculation is tantamount to rate-setting by the state, exactly the type of behavior prohibited by Section 332.[41]

2. Injunctive Relief Is Also Preempted

Similarly, an injunction attacking the CMRS providers pricing practices would also constitute rate regulation, as it would mandate either what services the CMRS provider could charge for or how much it could charge for such services.[42] As one court concluded in a challenge to a cellular carrier's billing for so-called

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[41] Moreover, such a claim should also be precluded because for the court to determine the reasonableness of a rate would intrude on the Commission's authority to, in the first instance, determine the reasonableness of a rate. See e.g., Bruss Co. v. Allnet Communications Servs., Inc., 606 F. Supp. 401, 408 (N.D. Ill. 1985) ("a dispute as to whether a carrier's rates or practices are reasonable has uniformly been deemed to be within the primary jurisdiction of the appropriate regulating agency"); Southwestern Bell Tel. Co. v. Allnet Communications Servs., Inc., 789 F. Supp. 302, 304 (E.D. Mo. 1992) ("Issues regarding the reasonableness of rates have been held by courts to be within the primary jurisdiction of the FCC."). See also Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 448, 27 S. Ct. 350, 358 (1907) (holding in ICC context that "a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission").

[42] An injunction against the practice would also in effect require a finding that the practice was unreasonable, a determination again left to the Commission. See note 41, supra.

"non-communications time" (including time charged in whole-minute increments), "[t]he request for such an injunction is nothing less than a request that the court regulate the manner in which [the cellular provider] calculates its rate schedules."[43]

For all of these reasons, the type of injunctive and monetary relief sought in Smilow and similar cases would involve states in the regulation of the rates charged by CMRS providers, intruding on the Commission's exclusive authority in this area, and violating Section 332(c)(3).[44]

3. Form of Action is Irrelevant

It is of no consequence if the state law claim challenging the CMRS provider's charges is labeled a claim for breach of contract, unfair trade practices, or the like -- rather than as a direct challenge to the rates themselves; nor does it matter whether the plaintiffs claim that they are challenging the disclosure of a rate policy, rather than the rates themselves. As the Supreme Court and other courts have

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[43] In re Comcast Cellular Telecomm. Litig., 949 F. Supp. 1193, 1201 (E.D. Pa. 1996).

[44] As noted above, an award of damages would also intrude on the Commission's primary jurisdiction to determine the reasonableness of a rate.

indicated[45] the true targets of these claims are the rates charged themselves. If the Commission does not foreclose all such avenues for challenges to CMRS rates, it will simply be allowing plaintiffs to manipulate pleading devices to circumvent the Commission's exclusive authority over CMRS rates.[46]

Support for the position that Section 332 bars all of these types of state law suits can also be found in two rounding up cases addressing the issue and concluding that such suits are barred.[47] In one of these suits, plaintiffs alleged breach of contract, unfair and deceptive trade practice, breach of implied duty of good faith and fair dealing, and unjust

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[45] See discussion of Arkla and, e.g., Southern Union Co., supra notes 35-36 and accompanying text.

[46] For example, in a class action case pending in the Superior Court of New Jersey against Bell Atlantic NYNEX Mobile, a plaintiff is challenging the quality of the carrier's service on the grounds that it was inconsistent with customer expectations in light of marketing and other materials provided to the customers and that the carrier allegedly failed to disclose information relating to the quality of its service. See Complaint, Carroll v. Cellco Partnership (N.J. Super. Ct. Law Div. (Camden County) filed Nov. 20, 1996).

Further, several of the challenges to whole-minute charges have been cloaked as attacks not on the charge itself, but rather on the provider's alleged failure adequately to disclose that such a charge existed.

[47] See In re Comcast Telecomm. Litig., 949 F. Supp. 1193 (E.D. Pa. 1996); Hardy v. Claircom Communications Group, 937 P.2d 1128 (Wash. Ct. App. 1997).

enrichment, claiming that they were not challenging the rates charged themselves, but the company's alleged failure to disclose them.[48] The court, however, recognized that the "claims alleged by the [p]laintiffs present a direct challenge to the way in which [the cellular provider] actually calculates the length of a cellular phone call and the rates which are charged for such a call. Thus, any state regulation of these practices is explicitly preempted under the terms of the Act."[49]

A similar result was reached in Hardy v. Claircom

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[48] See In re Comcast Cellular Telecomm. Litig., 949 F. Supp. 1193, 1199-1200 (E.D. Pa. 1996). The plaintiffs challenged the cellular provider's practice of rounding up and billing for connection time (i.e., the time between when a call is initiated and when two-way communication is established).

[49] Id. at 1201. The court later said: "In this case, [p]laintiffs have made a series of state law and common law allegations against Comcast. While none of these claims pose an explicit challenge to the rates charged by Comcast for cellular phone service, a careful reading of the complaint and the remedies sought by the [p]laintiffs demonstrates that the true gravamen of the complaint is a challenge to Comcast's rates and billing practices." Id. at 1203. It added: "Furthermore, under the language of Section 332, the only potential avenues for resolving a challenge to the rates charged by a CMRS provider are a complaint filed with the FCC or a suit filed in federal court. All state regulation of the rates charged by CMRS providers is explicitly preempted by the language of the Act. See 47 U.S.C.A. § 332." Id. at 1203-04.

Communications Group,[50] which alleged that two air-to-ground wireless carriers failed to inform customers of their rounding up practices in promotional material. The court specifically addressed Section 332(c)(3) and said that the plaintiff's "claims implicate not only the advertising practices of [the CMRS provider] but also the reasonableness of the carrier charging the tariff rate in light of those practices."[51] The court thus concluded that "[the] claims are therefore covered by the Act and are preempted."[52]

These cases make clear that no matter the form of the challenge, any effort based on state law attacking CMRS rate-charging structures and asking for monetary relief or an injunction against the practice would result in state regulation of CMRS rates, contrary to Section 332(c)(3) of the Communications Act.

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[50] 937 P.2d 1128 (Wash. Ct. App. 1997).

[51] Hardy, 937 P.2d at 1133.

[52] Hardy, 937 P.2d at 1133. The court said that the plaintiffs' "allegations are such that a court would necessarily have to consider the reasonableness of the rates charged in order to resolve them on the merits. Even assuming [plaintiffs] could prevail on any of their claims, any court-imposed award of damages would by definition result in their paying something other than the filed rate." Id. at 1132.

4. State Suits Threaten the Uniform, Nationwide System of Regulation Intended by Section 332(c)(3)

Finally, the Commission should hold that state-law claims are barred under Section 332(c)(3) since disparate state regulation of CMRS charges frustrates the Congressional goal of creating a uniform regulatory structure for CMRS rates. As the House Report accompanying the bill creating Section 332(c)(3) states, the preemption provision was included in order "[t]o foster the growth and development of mobile services that, by their nature, operate without regard to state lines."[53]

This goal has been recognized by both the Commission and the courts. For example, the Commission has stated that "the legislative history of OBRA makes plain" that Congress' intention was for there to be "establish[ed] a national regulatory policy for CMRS, not a policy that is balkanized state-by-state."[54] A

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[53] H.R. Rep. No. 103-111, at 260 (1993).

[54] Report and Order, In re Petition of New York State Public Service Commission to Extend Rate Regulation, 10 FCC Rcd. 8187, ¶ 24 (1995). The Commission has also said that "by adopting Section 332(c)(3)(A) of the Act, [Congress] intended generally to preempt state and local rate and entry regulation of all commercial mobile radio services to ensure that similar services are accorded similar regulatory treatment and to avoid undue regulatory burdens, consistent with the public interest." Second Report and Order, In re Implementation of Sections 3(n) and 332 of the

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federal district court also recognized that "Congress preempted any state or local regulation of the rates charged by CMRS providers, thereby avoiding the potential that a myriad of conflicting regulations issued by states and localities could thwart the comprehensive regulatory scheme embodied in the Communications Act."[55]

In a related context involving the Interstate Commerce Commission -- where certain authority was granted by Congress solely to the I.C.C., the Supreme Court said that:

> It would vitiate the overarching congressional intent of creating "an efficient and nationally integrated railroad system" to permit the State of Iowa to use the threat of damages to require a carrier to do exactly what the Commission is empowered to excuse. A system under which each State could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress in enacting the Interstate Commerce Act.[56]

[Footnote continued from previous page] Communications Act; Regulatory Treatment of Mobile Services, 9 FCC Rcd. 1411, ¶ 250 (1994), reconsideration granted in part, 10 FCC Rcd. 7824 (1995), reconsideration denied, 11 FCC Rcd. 19729 (1996).

[55] In re Comcast Telecomm. Litig., 949 F. Supp. 1193, 1204 (E.D. Pa. 1996).

[56] Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 325-26, 101 S. Ct. 1124, 1134 (1981) (citation omitted).

The detrimental effects of these inconsistent state regulations are exacerbated by the realities of the marketplace. Many CMRS providers operate geographically separate systems in a number of states,[57] but can benefit from economies of scale by creating regional or national operational systems. Disparate state regulation would significantly raise these providers' operating costs by forcing them to create separate operational systems, such as for billing and switching, for each individual state.[58] A similar problem arises in those CMRS service areas which cover more than one state;[59] there, disparate state regulation

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[57] For example, SBMS operates numerous separate CMRS systems throughout various portions of the country, both within the seven states served by SBMS's local exchange carrier affiliates and outside of those in-region territories, including the metropolitan areas of Boston, Chicago and Washington/Baltimore, and throughout upstate New York. The customers in all of these systems are charged for incoming calls and in whole minute increments. These characteristics are not required to be, and as a result are not, tailored to individual state requirements.

[58] As the court in Comcast noted, "Virtually identical allegations to the ones contained in the complaint presently pending before this court were filed in state courts in Pennsylvania, Delaware and New Jersey creating the potential for three radically different determinations of Comcast's obligations to its customers regarding its rates and billing practices." In re Comcast Cellular Telecomm. Litig., 949 F. Supp. 1193, 1204 (E.D. Pa. 1996).

[59] This situation, of course, exists throughout the country. As a local example, SBMS's Cellular One system in the Washington/Baltimore area encompasses 3 states

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would necessitate multiple operational systems and rate plans for the same system -- not only increasing costs but potentially creating customer confusion over rates. Moreover, in such situations it may become impractical or impossible to follow different state regulations.

These problems will only get worse as CMRS carriers consolidate their operations into multistate units and PCS operators with large MTA operating areas become operational and gain market share. The addition of these disparate and burdensome regulatory costs to the provision of CMRS service will discourage the entry of new wireless providers and will also discourage or thwart the efficiency-producing and customer-service enhancing expansion of already existing CMRS providers across state borders.[60]

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and the District of Columbia, combining 2 MSA licenses and 4 RSA licenses into a single CMRS system within which all rates charged and all customer care and operational characteristics are the same for all customers. In other areas, SBMS operates systems where a single MSA covers multiple states (e.g., the Kansas City MSA includes both Kansas and Missouri and the St. Louis MSA covers both Missouri and Illinois). While there are some minor zone-based rate plans within these various systems, the rates charged by SBMS are not tailored to the individual states in which the customers reside or in which they may be traveling.

[60] State regulation -- and inconsistent regulation among the states -- may also constitute regulation of CMRS entry prohibited by Section 332(c)(3). The Commission itself has stated that regulation may constitute a barrier to entry. See Notice of Proposed

[Footnote continued on next page]

CONCLUSION

For the foregoing reasons, the Commission should grant this Petition.

Respectfully submitted,

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Rulemaking, In re Decreased Regulation of Certain Basic Telecommunications Services, 2 FCC Rcd. 645, ¶ 11 (1987) ("The presence of traditional regulation itself may be a significant entry barrier to a market that otherwise could operate efficiently on a highly competitive basis."). Furthermore, the D.C. Circuit has recognized that the burdens created by regulation may constitute a barrier to entry. See Southern Pacific Communications Co. v. American Tel. & Tel. Co., 740 F.2d 980, 1001 (D.C. Cir. 1984) ("the costs and delays of the regulatory process clearly constitute barriers to entry"), cert. denied, 470 U.S. 1005, 105 S. Ct. 1359 (1985). As noted above, conflicting state regulations regarding CMRS charges will make it more difficult and costly for CMRS providers to establish service -- thus making it more difficult for entry to occur. In fact, it may be difficult or impossible for a CMRS provider to even follow inconsistent state regulations. Thus, state court adjudications in this area constitute forbidden entry regulation under Section 332(c)(3).